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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

HAVENSIGHT CAPITAL LLC,

Plaintiff and Appellant,

v.

FACEBOOK, INC.,

Defendant and Respondent.

A149366

(San Mateo County
Super. Ct. No. CIV 537307)

This is an appeal from the trial court’s order sustaining, without leave to amend, defendant Facebook, Inc.’s demurrer to the first amended complaint (FAC) filed by plaintiff Havensight Capital LLC. The FAC centers around plaintiff’s allegation that it was overcharged by defendant under a “pay per click” advertising contract. The court concluded the FAC failed to adequately state any claims for relief. On appeal, plaintiff has effectively forfeited any challenge as to the merits of the trial court’s order by failing to raise any substantive arguments in its opening brief. We therefore affirm the court’s ruling and the judgment dismissing plaintiff’s lawsuit.

BACKGROUND AND PROCEDURAL HISTORY

I. Background

In the FAC, plaintiff alleges that it “owns and operates a number of consumer product companies, including: a soccer brand, golf brand, men’s razor company, website design company, and a financial convenience company.” It “relies primarily, on online

advertising to market its products, and services.” Defendant is a social networking company “of notable scale for business online advertising.”

On several occasions, plaintiff purchased online ads for its business on the Facebook social networking site in order to gain website visits to a single specified website address. According to plaintiff, Facebook has a tool called Ads Manager that shows customers the number of website clicks generated from the ads customers place with it. Google has a similar tool called Google Analytics, which tracks and reports website traffic. After comparing data from Facebook’s Ads Manager to similar data from Google Analytics, plaintiff observed that Ads Manager tallied a visit count to its website that was 30 percent higher than that shown by the Google Analytics data, even though the Google tool measures total visits, not just visits from Facebook, as does Ads Manager. From this disparity, plaintiff asserts defendant is deliberately over-inflating the amount of visits generated from its site. Plaintiff also alleges that defendant has charged it varying amounts per click. For example, the charges ranged from 67 cents per click to 25 cents per click on two different days in 2015. Plaintiff asserts defendant’s conduct resulted in the denial of multiple venture capital funding requests.

II. Procedural History

On October 28, 2015, plaintiff filed a complaint with the San Luis Obispo County Superior Court.

On November 30, 2015, defendant demurred to the complaint and moved to transfer the action to San Mateo County pursuant to a venue clause in the parties’ operative advertising contract.

On January 26, 2016, the trial court granted defendant’s motion to transfer the action to San Mateo County.

On February 24, 2016, defendant refiled its demurrer.

On March 29, 2016, the trial court sustained defendant’s demurrer with leave to amend.

On April 4, 2016, plaintiff filed the operative FAC.

On May 4, 2016, defendant filed a demurrer to the FAC.

On June 16, 2016, the trial court filed its order sustaining defendant's demurrer without leave to amend.

On July 1, 2016, plaintiff filed a motion for new trial and to "correct clerical error." The motion was based on several points of error that plaintiff now asserts on appeal, namely (1) claimed improprieties in the manner in which defense counsel signed defendant's pleadings, (2) an assertion that defendant filed its case management statement one day late, and (3) a claim that the court violated the "[d]emurrer standard" by allowing factual arguments relating to exhibits attached to the FAC.

On September 12, 2016, plaintiff filed a notice of appeal from the order sustaining the demurrer without leave to amend.¹

On September 27, 2016, the trial court filed its order denying plaintiff's motion for new trial and to correct clerical error. The case was dismissed with prejudice that same day.

DISCUSSION

In challenging a judgment, the appellant bears the burden of affirmatively demonstrating trial court error by an adequate record. (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712; *Richard v. Richard* (1954) 123 Cal.App.2d 900, 902.) The

¹ "An order sustaining a demurrer is interlocutory and thus not appealable. Any appeal must be taken from the subsequently entered judgment of dismissal." (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 780; accord, *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1032, fn. 1 [ruling on demurrer not appealable but "subject to review on appeal from the appealable order of dismissal"].) Defendant has not moved for dismissal of this appeal. "Because a judgment of dismissal has actually been entered, we will liberally construe the appeal to have been taken from the judgment of dismissal." (*Los Altos Golf & Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 202; Cal. Rules of Court, rule 8.104(d)(2) [reviewing court may treat notice of appeal filed after trial court has announced its intended ruling but before it has rendered judgment as filed immediately after entry of judgment].)

appellant also must present legal analysis and supporting authority for each point asserted and must support each argument with appropriate citations to the record on appeal.

(*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; *In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 672–673, fn. 3.) It is important to emphasize that “[o]n appeal, [the] plaintiff bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law. . . . Because a demurrer tests the legal sufficiency of a complaint, the plaintiff *must* show the complaint alleges facts sufficient to establish *every element of each cause of action*.” (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43, italics added (*Rakestraw*).)

On appeal, plaintiff devotes its opening brief to a series of collateral attacks on the trial court’s order. For example, it complains of procedural errors that it asserts should result in defendant’s “default,” such as an alleged conflict of interest because defendant’s counsel represented another defendant, Google, Inc., a party that also has been sued by plaintiff. It also asserts here the same procedural points of error that it raised in conjunction with its new trial motion. These attacks are poorly briefed and do not affect the merits of the court’s ruling on the demurrer, which is the only ruling at issue in this appeal. We therefore will not consider them.²

As to the merits of this appeal challenging the sustaining of defendant’s demurrer, in its opening brief plaintiff merely states in conclusory fashion that the FAC “clearly stated every element of each tort[,], including damages.” Apart from arguing that the FAC properly alleged damages, plaintiff does not specifically address any of the causes of action contained in the pleading, much less any of the individual elements of these causes of action that the court below found were inadequately stated.³

² We observe plaintiff did not file an appeal from the trial court’s September 27, 2016 order denying its motion for new trial and to “correct clerical error.”

³ For example, the trial court noted that plaintiff’s claim for negligence was flawed because it attempted to allege the duty of care element based on a theory of premises liability.

“When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.” (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785; see *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 [“ ‘reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment’ ”]; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [appellate court “ ‘is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record’ ”]; accord, *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545–546.)

Plaintiff here has failed to provide any comprehensible argument challenging the merits of trial court’s ruling on the demurrer. Moreover, to overcome the flaws the trial court noted with respect to its claims, a plaintiff “bears the burden of proving there is a reasonable possibility of amendment” to save the complaint. (*Rakestraw, supra*, 81 Cal.App.4th at p. 43.) “To satisfy that burden on appeal, a plaintiff ‘must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.’ ” (*Ibid.*) “Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend.” (*Id.* at p. 44.) Plaintiff has failed to assert facts that could be alleged in an amended complaint to cure the defects noted by the trial court. Accordingly, the trial court’s denial of leave to amend the FAC was not an abuse of discretion.

DISPOSITION

The order sustaining defendant’s demurrer without leave to amend and the judgment of dismissal are affirmed.

Dondero, J.

We concur:

Humes, P. J.

Margulies, J.